

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO**

JENNIFER L. MILLER, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	
)	
MICHAEL J. ANDERSON, <i>et al.</i> ,)	Judge John R. Adams
)	
Defendants,)	Case No. 5:20-cv-01743-JRA
)	
and)	
)	
FIRSTENERGY CORP.,)	
)	
Nominal Defendant.)	

**JOINT MOTION OF ALL PARTIES AND ALL INTERVENORS
TO STAY THIS ACTION PENDING SETTLEMENT PROCEEDINGS**

All parties and all intervenor-plaintiffs in the above-captioned action hereby jointly request that the Court stay this action and vacate all case deadlines to accommodate settlement proceedings in the parallel shareholder derivative action pending before Chief Judge Marbley in the United States District Court for the Southern District of Ohio under the caption *Employees Retirement System of the City of St. Louis, et al. v. Jones, et al.*, Case No. 2:20-cv-4813 (the “Southern District Action”). The grounds for this joint request are explained in the accompanying memorandum set forth below.

**MEMORANDUM IN SUPPORT OF JOINT MOTION OF ALL PARTIES AND ALL
INTERVENORS TO STAY THIS ACTION PENDING SETTLEMENT PROCEEDINGS**

Case Background

1. This case, the parallel pending Southern District Action, and the parallel pending litigation in Ohio state court captioned *Gendrich v. Anderson et al.*, Case No. CV-2020-07-2107 (Ohio Ct. of Common Pleas, Summit Cnty.) (the “Ohio State Court Action”), are all shareholder

derivative lawsuits brought by plaintiffs on behalf of nominal defendant FirstEnergy Corp. (“FirstEnergy” or the “Company”) against Individual Defendants alleged to have breached their fiduciary duties to the Company and violated Section 14(a) of the Securities Exchange Act of 1934. The goal of these cases, like all shareholder derivative lawsuits, is to remediate alleged harm to the nominal defendant.

2. On November 16, 2020, intervenor-plaintiffs in this action Employees Retirement System of the City of St. Louis (“St. Louis”) and Electrical Workers Pension Fund, Local 103, I.B.E.W. (“Local 103”) were appointed Co-Lead Plaintiffs and Massachusetts Laborers Pension Fund was appointed Additional Plaintiff in the Southern District Action. *See Bloom v. Anderson*, 2020 WL 6710429 (S.D. Ohio Nov. 16, 2020). Counsel from Bernstein Litowitz Berger & Grossmann LLP and Saxena White P.A. were appointed Co-Lead Counsel, and counsel from Cohen Milstein Sellers & Toll PLLC were appointed Counsel. *Id.*

3. No lead plaintiff or lead counsel has been appointed in the instant action (the “Northern District Action”). All parties in the Northern District Action (including all Plaintiffs in the Northern District Action) join in this motion.

The Parties’ Proposed Global Settlement

4. All parties to this action, as well as all parties to the Southern District Action and the Ohio State Court Action (collectively, the “Parties”), have reached an agreement in principle for a global settlement (the “Settlement”) of the derivative claims asserted on behalf of FirstEnergy. The agreed-upon terms of the Settlement are reflected in the executed Term Sheet attached hereto as Exhibit 1. Under the terms of Settlement, FirstEnergy will receive \$180 million less a court-approved award of attorneys’ fees and expenses, and six directors who have been on

the Board a minimum of five years will not stand for re-election. Additionally, FirstEnergy will adopt governance reforms that relate to the Company's political spending and lobbying.

5. The Settlement's \$180 million financial component, which will be funded by the Individual Defendants' insurers, is a significant recovery for the Company. *See In re Community Health Sys., Inc. S'holder Deriv. Litig.*, No. 3:11-cv-00489 (M.D. Tenn. Jan. 17, 2017) (Transcript) (Ex. 2 hereto) (approving settlement comprised of \$60 million payment and governance reforms, described as "the biggest derivative settlement in the Sixth Circuit").

6. The Settlement also provides FirstEnergy with non-monetary relief, in the form of governance reforms, as set forth in Exhibit A to the Term Sheet.

The Need for a Stay Pending Settlement Proceedings

7. Having reached an agreement in principle, the Parties are working expeditiously to prepare a final settlement agreement. Once the agreement is finalized, FirstEnergy, all Plaintiffs and all Defendants in all related derivative actions have agreed to present the Settlement of FirstEnergy's derivative claims for preliminary approval in the Southern District Action, where there is a Court-appointed lead plaintiff and lead counsel. The Southern District Action is a consolidated action of six derivative actions, with Court-appointed lead plaintiffs, St. Louis and Local 103, who oversee Court-appointed lead counsel that have led Plaintiffs' settlement efforts. *See Bloom*, 2020 WL 6710429. By contrast, St. Louis and Local 103 are merely intervenors in this Northern District Action. In addition, final approval of the Settlement in the Southern District Action would result in a release (to the extent defined in the Settlement) and would have res judicata effect as to parallel derivative claims pending elsewhere. Submitting the Settlement separately for approval in each of the three courts presiding over the parallel derivative actions

would be inappropriately duplicative, waste party and judicial resources, and create a risk of conflicting determinations that are not in the best interest of FirstEnergy.

8. The Parties will keep this Court apprised of the status of the settlement proceedings as they progress. In the meantime, it is necessary, and in the best interests of FirstEnergy, that this action be stayed pending settlement proceedings in the Southern District Action.¹ Stays pending the finalization of a settlement are customary and routine.² Such a stay is particularly appropriate here because further litigation would fundamentally jeopardize the ability of the Parties to finalize their proposed Settlement, which would frustrate the well-established policy favoring the settlement of complex litigation. *See, e.g., Brent v. Midland Funding, LLC*, 2011 WL 3862363, at *12 (N.D. Ohio 2011) (“[T]he law favors settlement, particularly in class actions and other complex cases...”) (*quoting* 4 Alba Conte & Herbert Newberg, *NEWBERG ON CLASS ACTIONS* § 11.41 4th Ed. 2002).

9. In the Sixth Circuit, “[s]ettlements are welcome’ in derivative actions, and, ‘[a]bsent evidence of fraud or collusion, such settlements are not to be trifled with.’” *In re Big Lots, Inc. S’holder Deriv. Litig.*, No. 12-cv-00445 (S.D. Ohio Aug. 18, 2018), Final Approval Order (Ex. 3 hereto) at 4 (citing *Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205 (6th Cir. 1992)). There is no hint of “fraud or collusion” by the Parties here. *First*, the Settlement was

¹ A substantially identical stay motion is being filed simultaneously in the related Ohio State Court Action to effectuate the same purpose.

² *See, e.g., Barker, et al. v. Maier*, No. 5:19-cv-00276-JRA (N.D. Ohio April 1, 2020) (granting parties’ joint motion to stay pending settlement proceedings); *Puleo v. Walter Metals, LLC*, No. 5:19-cv-00647-JRA (N.D. Ohio Aug. 8, 2019) (same); *MLP Technology, Inc. v. LIFEMED ID, Inc.*, No. 5:14-cv-00683-JRA (N.D. Ohio Aug. 29, 2014) (same).

reached following more than 18 months of hard-fought litigation, in which more than ten contested motions were filed in three different courts.³

10. *Second*, the Settlement is fully supported by Plaintiffs in all three pending derivative actions and by FirstEnergy’s special litigation committee consisting of independent, non-defendant directors.

11. *Third*, the Settlement negotiations were hard-fought and facilitated by the close and active involvement of retired United States District Court Judge Layn R. Phillips, a preeminent mediator of complex shareholder representative actions. Indeed, “[t]he participation of an independent mediator in settlement negotiations *virtually [e]nsures* that the negotiations were conducted at arm’s length and without collusion between the parties.” *In re Wendy’s Co. S’holder Deriv. Action*, No. 1:16-cv-1153 (S.D. Ohio Jan. 24, 2020), Preliminary Approval Order (Ex. 4 hereto) at 14 (emphasis in original) (quoting *Bert v. AK Steel Corp.*, 2008 WL 4693747, at *2 (S.D. Ohio Oct. 23, 2008)). Numerous courts throughout the country have acknowledged the involvement of Judge Phillips in particular as a factor weighing in favor of settlement approval. *See, e.g., Voulgaris v. Array Biopharma Inc.*, 2021 WL 6331178, at *6 (D. Colo. Dec. 3, 2021) (“The arm’s-length nature of the parties’ negotiations and the active involvement of an independent mediator, such as Judge Phillips in particular, provide strong support for approval of the Settlement.”); *IBEW Local 697 Pension Fund v. Int’l Game Tech., Inc.*, 2012 WL 5199742, at

³ *See, e.g.,* Southern District Action, ECF Nos. 44 (order consolidating actions and appointing Co-Lead Plaintiffs and Co-Lead Counsel); 93 (order denying Defendants’ motions to dismiss); 142 (order denying stay); 160 (order denying as moot stay pending appeal); Northern District Action ECF Nos. 72 (granting motion to intervene); 117 (order denying Defendants’ motions to dismiss and motion to stay); Ohio State Court Action, order granting Plaintiffs’ motion to consolidate related derivative actions (09-08-20); order appointing co-lead counsel (09-23-20), and where motions to dismiss and stay are fully briefed. *See also Employees Retirement System of the City of St. Louis v. Jones*, 2021 WL 6067034 (6th Cir. Dec. 16, 2021) (dismissing appeals and rejecting mandamus petitions).

*2 (D. Nev. Oct. 19, 2012) (finding settlement was fair when it was reached with “the assistance of an experienced and reputable private mediator, retired Judge Phillips”).

12. The Court can, moreover, be assured that the Settlement will be subjected to a rigorous approval process by Chief Judge Marbley in the Southern District Action.

* * *

13. In sum, following hard-fought litigation and arms'-length negotiations supervised by an experienced and respected mediator, the Parties have reached a global Settlement. A stay pending Settlement proceedings in the Southern District Action is necessary to ensure the Settlement can be presented for court approval without wasting judicial resources in unnecessarily duplicative proceedings that would create a risk of conflicting determinations. Accordingly, all Parties in all three pending derivative cases respectfully request that the Court grant the jointly requested stay. Counsel are available to discuss the Settlement and this request with the Court at the Court's convenience should the Court have any questions.

February 10, 2022

Respectfully submitted,

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I hereby certify that on February 10, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys on record.

/s/ John C. Camillus

John C. Camillus